

1 Kristen K. Waggoner Eric Kniffin*
2 WA Bar No.27790 CO Bar 48016
3 AZ Bar No. 32382 KNIFFIN LAW
4 Katherine Anderson 102 S. Tejon St., Suite 1100
WA Bar No. 41707 Colorado Springs, CO 80903
AZ Bar No. 29490 Telephone: (719) 212-4391
5 Ryan Tucker*
AZ Bar No. 034382 George M. Ahrend
6 Mark Lippelmann* WA Bar No. 25160
AZ Bar No. 036553 AHREND LAW FIRM
7 ALLIANCE DEFENDING FREEDOM 421 W. Riverside Ave., Suite 1060
15100 N. 90th Street Spokane, WA 99201
8 Scottsdale, AZ 85260 Telephone: (206) 467-6090
9 Telephone: (480) 444-0020 George@luveralawfirm.com
kwaggoner@ADFlegal.org *Counsel for Plaintiffs*
kanderson@ADFlegal.org
10 rtucker@ADFlegal.org
11 mlippelmann@ADFlegal.org *Admitted *Pro Hac Vice*

12 **UNITED STATES DISTRICT COURT**
13 **EASTERN DISTRICT OF WASHINGTON**

14 **ORTHODOX CHURCH IN AMERICA, ET AL.,**

15 *Plaintiffs,*

16 v.

17 **ROBERT FERGUSON, ET AL.,**

18 *Defendants.*

19 Case No.: 2:25-cv-00209-RLP

20 **PLAINTIFFS' REPLY IN SUPPORT OF**
21 **MOTION FOR PRELIMINARY**
22 **INJUNCTION**

23 **JULY 25, 2025**
WITH ORAL ARGUMENT: 10 AM
SPOKANE COURTROOM 901

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1 **INTRODUCTION**

2 Just today, a court preliminarily enjoined SB 5375 as to the Catholic Church.
3 *Etienne v. Ferguson*, no. 3:25-cv-05461-DGE, ECF No. 227 (W.D. Wash.) (Order)
4 (attached as Exhibit 1). This Court should do likewise for Orthodox Plaintiffs. “[N]o
5 case ... has given approval to the invasion of the ... rite of confession by an agency
6 of the government.” *Mockaitis v. Harclerode*, 104 F.3d 1522, 1533 (9th Cir. 1997).

7 Plaintiffs have standing because Washington’s new law threatens priests with
8 prosecution for fulfilling their religious obligations and chills the faithful from
9 receiving the Sacrament of Confession. As the Western District recognized,
10 Defendants “affirmed” enforcement. Order 11. On the merits, Defendants trigger
11 and fail strict scrutiny. Granting attorneys a privilege exemption but denying clergy
12 the same offers “a textbook example” of religious targeting. *Id.* at 17. The *Clause*
13 also “explicitly single[s] out” clergy, retains many secular privileges, and was
14 motivated by religious animus. *See id.* at 18. Defendants make only a cursory—and
15 insufficient—effort to meet their strict scrutiny burden. *See id.* at 20–22.

16 Plaintiffs don’t object to being mandatory reporters; they already report. They
17 simply seek the “narrow” privilege protection for the Sacrament. This Court should
18 join the Western District and preliminarily enjoin Defendants from enforcing SB
19 5375 to require clergy to disclose information learned solely during the Sacrament.

20 **ARGUMENT**

21 **I. Clergy have standing to challenge a bill targeting “clergy.”**

22 The new law injures Plaintiffs in two ways: it threatens priests with
23 prosecution for fulfilling their religious obligations and it chills the Orthodox faithful

1 from going to Confession. And Defendants have affirmed enforcement.

2 As the Supreme Court recently reaffirmed, “when a deprivation of First
3 Amendment rights is at stake, a plaintiff need not wait for the damage to occur before
4 filing suit.” *Mahmoud v. Taylor*, No. 24-297, 2025 WL 1773627, at *20 (U.S. June
5 27, 2025). And “when the threatened enforcement effort implicates First
6 Amendment rights, the inquiry tilts dramatically toward a finding of standing.”
7 *Peace Ranch, LLC v. Bonta*, 93 F.4th 482, 487 n.7 (9th Cir. 2024) (cited at Opp. 9
8 n.1). Given the “different standard” that “applies to First Amendment standing,” the
9 rule from *Susan B. Anthony List* controls. *See id.*; Order 7 & n.4. Under that rule,
10 Plaintiffs need only show that “the threatened injury is certainly impending, or there
11 is a substantial risk that the harm will occur.” *Mahmoud*, 2025 WL 1773627 at *20.
12 “It is sufficient for standing purposes that the plaintiff intends to engage in a course
13 of conduct arguably affected with a constitutional interest and that there is a credible
14 threat that the challenged provision will be invoked against the plaintiff.” *LSO, Ltd.*
15 *v. Stroh*, 205 F.3d 1146, 1154–55 (9th Cir. 2000) (citation modified). Even so,
16 Plaintiffs also have standing under Defendants’ proffered standard. *See* Opp. 9.

17 Defendants rightly do not dispute that Plaintiffs have a protected religious
18 right to keep information disclosed during Confession confidential. *See* Opp. 22.
19 Instead, Defendants suggest Plaintiffs don’t have a “concrete plan” to violate the
20 law. Opp. 10. But they don’t dispute that Plaintiffs’ priests hear confession
21 throughout Washington during which the faithful confess their “personal failings”
22 and “intensely private matters.” Wilkinson Decl. ¶¶ 5, 13; Phelps Decl. ¶¶ 5, 13;
23 Antiochian Decl. ¶¶ 15, 23, 29, 48. Defendants similarly do not dispute that

1 Plaintiffs have a centuries-old obligation to protect the confidentiality of Confession.
2 *See* Opp. 22. And they don't challenge that the reporting law "discourages penitents
3 from confessing sins" such as parents viewing their children as "burdensome" or
4 "blam[ing] the child for the child's problems in school or at home." MPI 10. Thus,
5 Plaintiffs have "previously engaged in conduct that would violate the challenged
6 law" and have a policy that directly collides with the law, which satisfies the standing
7 inquiry. *Seattle Pac. Univ. v. Ferguson*, 104 F.4th 50, 59 (9th Cir. 2024). Defendants
8 cannot condition a lawsuit to protect the confidentiality of Confession on Plaintiffs'
9 willingness to violate that religious duty. *See* Order 11; *NAACP v. Alabama*, 357
10 U.S. 449, 462 (1958) (recognizing the "vital relationship between freedom to
11 associate and privacy in one's associations").

12 Indeed, the Washington legislature made clear that it passed the *Clause* to
13 target clergy and information disclosed in Confession. MPI 6–9. As Sen. Frame
14 recognized, the *Clause* demands Plaintiffs "change their rules" regarding the
15 confidentiality of Confession—and that's what Plaintiffs cannot and will not do.
16 Kniffin Decl. ¶ 17.

17 Criminal prosecution and civil liability are only half the injury: Defendants
18 don't dispute the *Clause* chills the Orthodox faithful from participating in the
19 Sacrament. *See* MPI 11–12; ROCOR Decl. ¶¶ 46–47; OCA Decl. ¶¶ 46–48. "[A]
20 chilling of the exercise of First Amendment rights is, itself, a constitutionally
21 sufficient injury." *Tingley v. Ferguson*, 47 F.4th 1055, 1067 (9th Cir. 2022) (citation
22 modified). And a "substantial burden is imposed" on church leaders' free exercise
23 rights "by the intrusion into the Sacrament of Penance by officials of the state."

1 *Mockaitis*, 104 F.3d at 1531. Where such an “intrusion” is “defended … by an
2 assistant attorney-general of the state as not contrary to law,” a bishop has
3 “justifiable grounds for fearing that without a declaratory judgment and an
4 injunction … the administration of the Sacrament of Penance for which he is
5 responsible … will be made odious … by the intrusion of law enforcement officers.”
6 *Id.* “The sinner will not confess … if the veil of secrecy is removed.” *Id.* at 1532.

7 Plaintiffs also have a credible fear of enforcement under *SBA List*. Defendants
8 miss the mark by arguing that this amended law has “no history of enforcement” and
9 no “specific warning or threat” to Plaintiffs. Opp. 12. It’s a new law as to clergy, so
10 this factor has “little weight.” *Cal. Trucking Ass’n v. Bonta*, 996 F.3d 644, 653 (9th
11 Cir. 2021). What weight it does have shows Plaintiffs’ standing. Defendants have
12 “affirmed” enforcement, which is “sufficient.” Order 11. *Accord Union Gospel*
13 *Mission of Yakima Wash. v. Ferguson*, 2024 WL 3755954, at *3 (9th Cir. Aug. 12,
14 2024). Defendant Ferguson was “disappointed” the Catholic Church filed suit
15 against SB 5375 because he thinks infringing on sacramental confidentiality is
16 “important.” Kniffin Reply Decl. Exs. L, M. Because Plaintiffs filed this case before
17 the *Clause*’s “effective date … it was not possible for the state to have enforced” it.
18 *Cal. Trucking*, 996 F.3d at 653. But the mandatory reporting law has a long history
19 of criminal and civil enforcement. *See, e.g., Evans v. Tacoma Sch. Dist. No. 10*, 380
20 P.3d 553, 561 (Wash. Ct. App. 2016); *State v. James-Buhl*, 415 P.3d 234, 236 (Wash.
21 2018); *State v. Motherwell*, 788 P.2d 1066, 1067 (Wash. 1990) (attempted
22 enforcement of mandatory reporting law against clergy). That “history of past
23 enforcement against parties similarly situated to the plaintiffs cuts in favor of a

1 conclusion that a threat is specific and credible.” *Cal. Trucking*, 996 F.3d at 654.

2 **II. Defendants likely violate the Free Exercise and Equal Protection Clauses.**

3 Defendants’ efforts to resist strict scrutiny fail for four independent reasons.
4 First, under any reading of the mandatory reporting statute, attorneys receive a
5 privilege exemption but clergy don’t. Second, the *Clause* facially discriminates
6 against religion. Third, the *Clause* selectively repeals privileges for clergy while
7 leaving secular privileges intact. Finally, the record shows religious animus.

8 **A. Washington law treats clergy privilege worse than attorney privilege.**

9 Defendants concede that under any reading of the mandatory reporting law,
10 “attorneys working at higher education institutions” receive a privilege “exception”
11 while clergy do not. Opp. 13. That admits a “textbook example” of lack of general
12 applicability and neutrality. Order 17.

13 The attorney-client privilege and the clergy-penitent privilege guard
14 comparable activities. *Contra* Opp. 16–17. Defendants’ claim that attorneys and
15 clergy aren’t similarly situated under their mandatory reporter law is irrelevant. *See*
16 *id.* Plaintiffs don’t challenge their addition as mandatory reporters. They only
17 challenge that the law revokes their narrow privilege exemption. Thus, the
18 appropriate comparison is between the secular *privileges* Washington allows and the
19 clergy privilege it refuses. Even so, Washington cannot escape its constitutional
20 obligations simply by classifying all clergy as mandatory reporters but only some
21 attorneys. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 17
22 (2020) (labeling some businesses “essential” but places of worship as “non-
23 essential” triggered strict scrutiny).

1 The United States Supreme Court and the Washington Supreme Court
2 recognize that both attorney-client and clergy-penitent relationships are “rooted in
3 the imperative need for confidence and trust” and “cannot be effective without
4 candid communication.” *Trammel v. United States*, 445 U.S. 40, 51 (1980); *Lowy v.*
5 *PeaceHealth*, 280 P.3d 1078, 1086 (Wash. 2012). But Defendants treat the secular
6 attorney privilege and the religious clergy privilege differently.

7 There is no question mandatory reporting issues arise in law school clinics. *See*
8 Order 17–18 (identifying law school “programs that *directly serve childrens*n”). Paul
9 Holland, who oversees a Seattle University clinic that represents “individuals
10 seeking relief from the obligation to register as juvenile sex offenders,” claimed that
11 the “dilemma” between the attorney-client privilege and mandatory reporting duties
12 had “forced [him] to alter [his] case selection.” Kniffin Reply Decl. ¶ 11. HB 1171’s
13 co-sponsor said the Legislature should expand the attorney-client privilege to
14 address “situations that have arisen where an attorney representing a client learns of
15 possible child abuse or neglect.” *Id.* ¶ 9. Yet legislators defended HB 1171’s
16 carveout for the attorney-client privilege as “narrow.” MPI 9. Legislators pointed
17 out the hypocrisy. *See* Kniffin Reply Decl. ¶¶ 11–12. When one asked “why is it ok”
18 to honor the attorney privilege but not clergy privilege, HB 1171’s lead sponsor said
19 that it’s “based on your conscience and policies.” *Id.* ¶ 11.

20 **B. The *Clause* facially discriminates against religion.**

21 The *Clause* also triggers strict scrutiny because “clergy were explicitly singled
22 out.” Order 18; *see* MPI 13. The *Clause* “expressly discriminates” against religion
23 *itself* and thus “imposes a penalty on the free exercise of religion that triggers the

1 most exacting scrutiny.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582
2 U.S. 449, 462 (2017).

3 **C. The *Clause* selectively repeals privileges for clergy.**

4 The *Clause* is further subject to strict scrutiny because it selectively repeals
5 privileges for clergy. MPI 13–16. Defendants claim the *Clause* is harmless. Opp.
6 17–18. But their interpretation is untenable because statutes must “be so construed
7 that no clause, sentence or word shall be superfluous, void, or insignificant.” *City of*
8 *Kent v. Beigh*, 32 P.3d 258, 260 (Wash. 2001).

9 i. The privileged communications carveout, by its express terms, applies to
10 “this *section*.” RCW § 26.44.030(1)(b) (emphasis added). “The word ‘section’ is
11 ordinarily used to denote a separately numbered part of a statute, including all
12 subdivisions or paragraphs.” *City of Kent*, 32 P.3d at 260. If the Legislature had
13 intended this carveout to only modify (1)(b), it would have instead designated “this
14 subsection,” as it did ten times in Section 26.44.030, three times in (1)(b) alone. It is
15 “an elementary rule that where the Legislature uses certain statutory language in one
16 instance, and different language in another, there is a difference in legislative intent.”
17 *Id.* at 264. (citation modified) “Therefore the language … ‘this section’ ...
18 encompasses ALL of section [030].” *See id.* at 260.

19 ii. A court must not “interpret the term ‘section’ in its nonordinary sense”
20 when doing so would render related sections of Washington law “superfluous, void,
21 or insignificant.” *Id.* But Defendants’ interpretation does just that. The privileged
22 communications statute subordinates “many” privileges to the mandatory reporting
23 statute, but not all. Opp. 14. Since adding 26.44.030(1)(b) in 2005, the Legislature

1 has recognized four new privileged communications—three with explicit carveout
2 for mandatory reports (domestic violence, mental health, and union privileges) and
3 one without (drug and alcohol recovery). RCW § 5.60.060(8)–(11); 2006 Wash.
4 Sess. Laws, ch. 30, § 1; 2009 Wash. Sess. Laws ch. 424, § 1; 2016 Wash. Sess. Laws
5 ch. 24, § 1; 2023 Wash. Sess. Laws ch. 202, § 2.

6 Further, Defendants’ argument that “all mandated reporters must comply with
7 (1)(a)—even when those individuals also fall within the scope of (1)(b)” renders the
8 *Clause* a nullity. *See Opp.* 18. Because SB 5375 added clergy as mandatory reporters
9 under (1)(a), if there were no available privileges, adding the *Clause* to (1)(b) would
10 be completely superfluous. *See Kent*, 32 P.3d at 260.

11 iii. During debate on SB 5375, lead sponsor Sen. Frame opposed an
12 amendment that would have stricken the *Clause* and required that the clergy-penitent
13 privilege be treated in a manner consistent with the sexual assault advocate privilege.
14 Kniffin Reply Decl. ¶¶ 8, 10. Compare RCW § 5.60.060(7)(b). If, as Defendants
15 claim, the *Clause* “does not treat members of the clergy differently” and that the duty
16 to report under (1)(a) “is unaffected by privilege,” Opp. 14, 18, this amendment
17 would have done nothing. Yet Senator Frame claimed the amendment would create
18 an unacceptable “loophole.” Kniffin Reply Decl. ¶ 10.

19 iv. Contrary to Defendants’ argument, RCW § 26.44.060(3) does not
20 “expressly specif[y]” that the clergy-penitent privilege is “inapplicable” to the
21 mandatory reporting law. Opp. 15. Clarifying that making a report “shall not be
22 deemed a violation of the confidential communication privilege of RCW 5.60.060(3)
23 [clergy]” doesn’t mean that the clergy-penitent privilege is inapplicable; it just

1 means that clergy *could* have reported.

2 v. Defendants' cited caselaw (at 15–16) is likewise misleading. All but one of
3 the cited cases predate the 2005 addition of the privileged communications
4 exemption in (1)(b). *See* 2005 Wash. Sess. Laws ch. 417. The only remaining case,
5 *State v. Hyder*, builds on these cases and only refers to the privilege in Section
6 8.83.110, not those in 5.60.060. 244 P.3d 454, 460 (Wash. Ct. App. 2011).

7 Defendants' argument presumes Sen. Frame misunderstood her own bill.
8 That's untenable. The superior reading is that the privileged communications
9 sentence applies to the whole "section," just as it says, and that the "[n]othing" clause
10 that follows merely clarifies that (1)(b)'s rules for supervisors do not undercut or
11 qualify any mandatory reporter's duties under (1)(a). This interpretation alone
12 honors the text of Section 26.44.030, the Legislature's fine-tuned references to
13 mandatory reporting in the privilege law, and the legislative history.

14 **D. The record shows religious animus.**

15 The record shows much more than "stray remarks" from legislators. *Contra*
16 Opp. 20. It shows "the intentional abrogation of a practice that the legislature
17 understood to be religiously sacrosanct." Order 19. Sen. Frame made multiple
18 comments hostile to religion and narrow privilege for clergy. Kniffin Decl. ¶¶ 11,
19 17; *see also id.* ¶ 15. The Legislature rejected four separate amendments retaining
20 privilege for clergy while expanding the secular attorney-client privilege exemption.
21 MPI 14–15; *see also* Kniffin Reply Decl. ¶¶ 7, 8, 10. And Defendant Ferguson said
22 it was "important" to invade the Sacrament of Confession, and he was
23 "disappointed" the Catholic Church would file a lawsuit to protect the confidentiality

1 of Confession. Kniffin Reply Decl. Exs. L, M. All that shows “a clear and
2 impermissible hostility” to Plaintiffs’ religion. *Masterpiece Cakeshop v. Colo. C.R.*
3 *Comm’n*, 584 U.S. 617, 634–36 (2018).

4 **III. Defendants likely fail strict scrutiny.**

5 Defendants offer only a cursory—and inadequate—effort to meet their strict
6 scrutiny burden. They claim that adding clergy as mandatory reporters meets strict
7 scrutiny. *See* Opp. 21. But Plaintiffs challenge the revocation of privilege
8 exemptions, not the addition of them as mandatory reporters. *See* MPI 1. Defendants
9 fail to meet their burden because they do not show that removing the privilege is
10 narrowly tailored to any compelling interest. *See* Order 22.

11 A. Nothing in Defendants’ statistical evidence links instances of abuse to
12 information disclosed within the narrow confines of the confidentiality of
13 Confession. *See* Opp. 2–5. But Defendants need evidence of a “direct causal link”
14 to meet their burden. *Brown v. Ent. Merch. Ass’n*, 564 U.S. 786, 799 (2011). What
15 their statistics do show is that in 2023 in Washington (as opposed to Defendants’
16 irrelevant discussion of national statistics), only 2.9% of reports from all sources
17 were “substantiated.” Kniffin Reply Decl. ¶ 13. The rest were unsubstantiated or
18 didn’t even trigger the law, with 67 reports even identified as “intentionally false.”
19 *Id.* And while Defendants claim “serious health concerns,” their data doesn’t show
20 that those “concerns” were at all substantiated, and their other data suggests only a
21 small number would be. *See* Paradis Decl. Ex. 9, Doc. 148-9 at 3. Evidence also
22 indicates that mandatory reporting laws are counterproductive because they
23 overburden government resources, erode trust in professional relationships, and

1 discourage families in need from seeking help. Kniffin Decl. Ex. J at 26–40.

2 B. Defendants acknowledge at least 43 states have mandatory reporter laws
3 that respect the clergy-penitent privilege. Opp. 5–6. That directly parallels the facts
4 in *Holt v. Hobbs*, where Arkansas said its compelling interest in prison security
5 justified refusing a religious accommodation for a half-inch beard, but 43 states had
6 found otherwise. 574 U.S. 352, 368 (2015) (citing Pet. Br. 24–25, 2014 WL 2200467
7 (43 states and federal BOP permit such beards for religious reasons)). The Supreme
8 Court held that “when so many [states] offer an accommodation” for religious
9 exercise, an outlier state “must, at a minimum, offer persuasive reasons why it
10 believes that it must take a different course.” *Id.* at 369. As in *Hobbs*, Defendants’
11 “fail[ure] to make that showing” is determinative. *Id.*

12 C. Defendants’ rational basis arguments, Opp. 20, miss the mark for the same
13 reasons. Plaintiffs challenge only the revocation of the privilege exemptions. That
14 revocation will discourage penitents from coming to Confession, which will prevent
15 them from receiving both absolution and spiritual counseling to make amends in
16 their lives (and Washington recognizes secular privileges for similar reasons). *See*
17 OCA Decl. ¶¶ 28–29, 63–64. The *Clause* is thus counterproductive and cannot
18 withstand even rational basis review.

19 **IV. Defendants likely violate Plaintiffs’ church autonomy.**

20 As Defendants admit, the church autonomy doctrine protects churches’ right
21 “to decide matters of faith and doctrine without government intrusion.” Opp. 22
22 (citation modified). That’s exactly what the *Clause* prevents. As a doctrinal matter,
23 Plaintiffs cannot disclose what their priests hear in confession. *E.g.*, Wilkinson Decl.

1 ¶¶ 7–8. But, as summarized by Sen. Frame, the *Clause* requires Plaintiffs to change
2 their “rules” on that confidentiality.

3 The autonomy doctrine expands beyond the ministerial exception. *Contra*
4 Opp. 23. It protects religious organizations’ “independence in matters of faith and
5 doctrine.” *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 747
6 (2020). That includes attempted state interference in the rules for the Sacrament—
7 “an essential expression of the Christian faith and central to growth in spiritual life.”
8 OCA Decl. ¶ 23. Invading the confidentiality of confession “is to declare that there
9 shall be no penance” and “annihilate[]” the Sacrament. *Mockaitis*, 104 F.3d at 1532
10 (quoting *People v. Phillips* N.Y. Ct. Gen. Sess. (1813)). Both the caselaw and related
11 historical practice show Plaintiffs’ church autonomy claim will likely succeed.

12 **V. The other preliminary injunction factors weigh in Plaintiffs’ favor.**

13 Defendants’ arguments about the other preliminary injunction factors are
14 derivative of their arguments on the merits. *See* Opp. 24–25. They fail for the same
15 reasons. *See* Order 22–23. Plaintiffs will suffer imminent harm from a law targeted
16 at them. *Supra* Part I. And the law chills the faithful in fulfilling their religious
17 obligations. *Id.* Finally, “it is always in the public interest to enjoin unconstitutional
18 laws.” *Miller v. Bonta*, 646 F. Supp. 3d 1218, 1231 (S.D. Cal. 2022).

19 **CONCLUSION**

20 The Court should join the Western District and enter a preliminary injunction
21 enjoining Defendants from enforcing SB 5375 to require Plaintiffs to disclose
22 information they learn solely during the Sacrament of Confession.

1 Respectfully submitted this 18th day of July 2025,

2 Eric Kniffin*
3 CO Bar 48016
4 KNIFFIN LAW PLLC
5 102 S. Tejon St., Suite 1100
6 Colorado Springs, CO 80903
(719) 212-4391
eric@kniffin.law

7 George M Ahrend
8 WA Bar No. 25160
9 AHREND LAW FIRM PLLC
421 W. Riverside Ave.
Suite 1060
10 Spokane, WA 99201
Telephone: (206) 467-6090
11 George@luveralawfirm.com

13 *Counsel for Plaintiffs*

14 *Admitted *Pro Hac Vice*

15 */s/ Katherine Anderson*

16 Kristen K. Waggoner
WA Bar No.27790
AZ Bar No. 32382
Katherine Anderson
WA Bar No. 41707
AZ Bar No. 29490
Ryan Tucker*
AZ Bar No. 034382
Mark Lippelmann*
AZ Bar No. 036553
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
Telephone: (480) 444-0020
kanderson@ADFlegal.org
rtucker@ADFlegal.org
mlippelmann@ADFlegal.org

17 John J. Bursch*
18 MI Bar No. P57679
19 Mathew W. Hoffmann*
VA Bar No. 100102
ALLIANCE DEFENDING FREEDOM
20 44180 Riverside Parkway
Lansdowne, VA 20176
Telephone: (571) 707-4655
mhoffmann@ADFlegal.org

21 David A. Cortman*
22 GA Bar No. 188810
ALLIANCE DEFENDING FREEDOM 1000
Hurricane Shoals Rd. NE Suite D-1100
Lawrenceville, GA 30043
Telephone: (770) 339-0774
dcortman@adflegal.org

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on July 18, 2025, I electronically filed the foregoing
3 paper with the Clerk of Court using the ECF system which will send notification of
4 such filing to all counsel of record.

5
6 *s/ Katherine Anderson*
7 Katherine Anderson
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